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Asylum for Trafficked Women: Escape Strategies Beyond the T Visa

*Tala Hartsough**

INTRODUCTION

Trafficking in persons is a global trade sustained by the profits from forced labor. Human traffickers exploit poverty, disparate female rights and emergent political situations. Trafficking violates the human rights of people who are bought and sold, enslaved by debt bondage schemes and manipulated by contracts. Increasingly, these human commodities end up in the United States. The U.S. government recognized the gravity of the situation by enacting the Victims of Trafficking and Violence Protection Act of 2000.¹ This note examines how the Act protects the people for whom it is named and suggests an alternative route to protection under U.S. asylum jurisprudence.

Section I examines trafficking in the United States. The historical context and underlying causes of trafficking shed light on how it is internationally organized. Trafficking is placed within the understanding of slavery in the modern world. The section also addresses definitional issues that must precede any attempts to remedy this crisis. Section II identifies the mechanisms by which the Act attempts to protect trafficked individuals, with a focus on the immigration aspects of the Act, namely the T visa. Section III comments on T visa. Section IV investigates the strategy of a person trafficked to the United States seeking asylum.

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1. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No-106-386 Division A, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C.).

I. TRAFFICKING TO THE UNITED STATES

A. PARTICIPANTS: TRAFFICKERS AND VICTIMS

The root cause of trafficking is the lack of rights experienced by women in their homes, communities, and state governmental structures.² "By failing to protect and promote women's civil, political, economic and social rights, Governments create situations in which trafficking flourishes."³ Trafficked women's advocates attribute the success of traffickers to the widening gap between rich and poor countries, the related impoverishment of women, the enormous potential profits in trafficking, and government inaction or even complicity.⁴ Recent anti-immigration trends feed into a successful trafficking industry. "Restrictive and exclusionary immigration policies, when combined with the destabilizing effects of conflict, globalization and neo-liberal development strategies which result in increasing outflows of legal and illegal migrant labour, serve as important causative factors in the persistence and prevalence of trafficking."⁵

An estimated 700,000 to four million women and children⁶ are trafficked worldwide each year.⁷ These numbers exclude the people trafficked within their own borders, such as within Thailand, India,⁸ and the United States.⁹ Of the globally trafficked women and children, 45,000 to

2. *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women. Report of the Special Rapporteur on Violence Against Women*, U.N. ESCOR, 56th Sess., Agenda Item 12(a), at 19, U.N. Doc. E/CN.4/2000/68 (2000) [hereinafter *Special Rapporteur*] (noting that the lack of rights also causes women to migrate). "While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration. At the heart of this distinction is the issue of consent." *Id.* at 8.

3. *Id.* at 19.

4. GILLIAN CALDWELL ET AL., *CRIME & SERVITUDE: AN EXPOSE OF THE TRAFFIC IN WOMEN FOR PROSTITUTION FROM THE NEWLY INDEPENDENT STATES* 15 (1997), available at www.globalsurvival.net/femaletrade/9711russia.html (Global Survival Network website).

5. *Special Rapporteur*, *supra* note 2, at 21.

6. As will be briefly discussed, both men and women are trafficked; however this note will focus on women because they are disproportionately targeted by traffickers and suffer unique harms. Children have special, often limited, legal rights and social decision-making power. As such, it should be noted that women and children should be treated differently in the context of rights and remedies. Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective*, 20 WOMEN'S RTS. L. REP. 11, 13 (1998).

7. U.S. DEP'T OF STATE, *VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 1* (2001), available at <http://state.gov/g/inl/rts/tiprpt/2001/index.cfm?docid=392> [hereinafter *DEP'T OF STATE TRAFFICKING REPORT*] (estimating 700,000 trafficked worldwide annually). *But cf. Special Rapporteur*, *supra* note 2, at 24 (noting that the U.N. estimates four million people trafficked worldwide annually).

8. Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 3 n.4 (Apr. 2000) (Intelligence Monograph on file with Center for the Study of Intelligence). While this note will briefly discuss the inclusion of intra-border trafficking, the focus is international cross-border trafficking, specifically to the United States.

9. Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*,

50,000 are trafficked to the United States, primarily from Thailand, Vietnam, China, Mexico, Russia, Ukraine, and the Czech Republic.¹⁰ Other countries of origin include the Philippines, Korea, Malaysia, Latvia, Hungary, Poland, Brazil, and Honduras, among others.¹¹ Women are mostly transported to Florida, New York, and California, but there have been reports of trafficked women in twenty states.¹² The average trafficked woman is twenty years old and works as a prostitute, a domestic servant, a maid, a peddler or a beggar, or works in a sweatshop or agriculture.¹³

The lack of equal and just employment opportunities in countries of origin contributes to women's migration, as they "leave their homes in search of viable economic options."¹⁴ Trafficking to the United States for the sex industry also has its roots in "military sex colonialism" in Southeast Asia.¹⁵ During World War II, "Southeast and East Asian women were forced to serve as 'comfort women' for the Japanese military."¹⁶ During the Vietnam War, Thailand and the United States shared a Rest and Recreation Treaty.¹⁷ Western troops carried home the myth of exotic Asian women.¹⁸ Prostitution continued around military bases and through a demand for mail-order brides.¹⁹ One commentator described "the burgeoning sex-tourism business [as] the financial substitute for the U.S.

2 MICH. J. GENDER & L. 83, 89 (1994) (describing pervasive intra-border trafficking in the United States).

10. Richard, *supra* note 8, at 3.

11. *Id.*

12. *Id.* Trafficking victims are rotated between cities so as not to attract attention in one spot. *Id.* Choices of cities may be related to visa fraud vulnerability or a useful local population. *Id.* Richard describes New York City, Miami, and Los Angeles as the highest centers of general visa fraud with New York's JFK, Miami International, Los Angeles' LAX, San Francisco's SFO, and Chicago's O'Hare as the major ports of entry for traffickers. *Id.* Additionally, some Russian traffickers use overland routes via Toronto because of its large Russian population. *Id.*

13. *Id.*

14. *Special Rapporteur, supra* note 2, at 20 (describing the phenomenon of the feminization of poverty leading to the feminization of migration).

15. Maya Raghu, *Sex Trafficking of Thai Women to the United States and the U.S. Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 153 (1997). See also Margaret A. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 FORDHAM INT'L L.J. 1852, 1864-67 (1995) (discussing the transition from military prostitution to international sex tourism); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 193 (1997) (describing the "great western male fantasy" of Asian women historically based in military involvement in Asia and the "derivative Asian Pacific sex tourism industry").

16. Raghu, *supra* note 15, at 153; SIRIPORN SKROBANAK ET AL., *THE TRAFFIC IN WOMEN: HUMAN REALITIES OF THE INTERNATIONAL SEX TRADE* 17 (1997).

17. Raghu, *supra* note 15, at 153; Patricia D. Levan, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 AM. U. J. INT'L L. & POL'Y 869, 880 (1994).

18. Raghu, *supra* note 15, at 153.

19. *Id.*; Cho, *supra* note 15, at 193. See generally SAUNDRA POLLOCK STURDEVANT & BRENDA STOLTZFUS, *LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA* (1992) (documenting contemporary military prostitution).

military's presence in Indochina."²⁰ The transition was made to a "market demand for traffic to the United States and other industrialized nations."²¹

A consensus exists among those researching and investigating international trafficking that poverty is a main catalyst of the trafficking industry.²² Traffickers exploit the hierarchies of power within developing countries and between developing and industrialized countries.²³ Economic globalization creates the prime conditions for trafficking.²⁴ The effort to attract foreign capital often leads to the alienation of major segments of the population in developing countries.²⁵ Income disparity widens, and the effects are especially felt in rural populations and by women.²⁶ "Women are notably disadvantaged during the transition to market economies because they lack entitlements and access to resources such as land and capital . . ."²⁷ A country's pattern of development emphasizing exportation and industrialization often promotes economic progress without providing a social safety net or addressing domestic income disparities.²⁸ Survival strategies for rural families can even include selling children into prostitution.²⁹

Young women who leave rural areas and find jobs in the formal sector³⁰ are not likely able to afford their personal living expenses, much less send money to their families.³¹ Additionally, women are the first to be displaced by technological changes in the formal sector because they lack education and status.³² Traffickers work within vulnerable communities, purchasing children from parents or promising women and girls legitimate jobs.³³ An agent in Thailand might give parents \$250 in exchange for a

20. Levan, *supra* note 17, at 871.

21. Raghu, *supra* note 15, at 153.

22. See generally *id.*; Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 94-99 (1998); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 630 (1991); Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 227-28 (1999).

23. Raghu, *supra* note 15, at 145.

24. See *id.*; 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback regarding the Conference Report on the Victims of Trafficking and Violence Protection Act).

25. Raghu, *supra* note 15, at 146.

26. *Id.*

27. *Id.*

28. See Lin Lean Lim, *Whither the Sex Sector? Some Policy Considerations*, in THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA 206, 206-07 (Lin Lean Lim ed., 1998).

29. See *id.* at 207. The impoverishment of rural populations puts rural children especially at risk. *Id.*

30. Formal sector refers to legal employment. Typical formal sector jobs in underdeveloped economies include light manufacturing and assembly.

31. See Lim, *supra* note 28, at 207 (giving the example of Indonesian women who make up ninety percent of the workers in textile, garment, tobacco, and electronics industries).

32. Raghu, *supra* note 15, at 157.

33. *Id.* at 159-60.

child, enough to feed a family of five for six months.³⁴ In some poor agricultural villages in Thailand, it is apparent from the renovations or new electrical appliances in households which families “have sent their daughters into the sex sector.”³⁵ In some parts of post-Cold War Russia, where ninety percent of the unemployed are women, “women are willing to accept offers of employment abroad as ‘models,’ ‘dancers,’ and ‘waitresses.’ It is only later that they realize that they were offered false employment and have been sold into prostitution by organized criminals.”³⁶

Overseas, large criminal organizations maintain the trafficking routes. United States law enforcement understands organized crime to mean hierarchical associations of individuals or groups working conspiratorially with a coordinated and disciplined approach that insulates the leadership.³⁷ The goal of these organizations is to profit from illegal enterprises.³⁸ The United Nations’ definition of organized criminal groups includes associations of three or more people, existing for some time with the goal of committing a serious crime for financial or material gain.³⁹ In the United States, trafficking is typically carried out by smaller crime rings and loosely connected criminal networks, sometimes made up of one family or extended family.⁴⁰ This does not mean that the level of violence or intimidation is lower for women nor does it preclude the expansion of larger organized crime syndicates into the United States market.⁴¹

Asian organized crime syndicates traffic Asian women to the United States⁴² and run brothels in cities such as Los Angeles, San Francisco, Sacramento, Las Vegas, and Dallas.⁴³ Asian street gangs, local groups in a position akin to subcontractors, provide protection, kidnapping, and retrieval services to brothels in New York, Philadelphia, and Chicago.⁴⁴ The Asian trafficking syndicate is not a hierarchical organization from beginning to end.⁴⁵ Instead, it is run on a sub-contractor basis as a “loose joint venture.”⁴⁶ These discrete groups can include “enforcers, transporters, recruiters, document forgers, brokers, brothel owners, and employment agencies.”⁴⁷

Thailand is an example of a major source country for women trafficked

34. *Id.* at 159.

35. Lim, *supra* note 28, at 207.

36. Pilkerton, *supra* note 22, at 228.

37. Richard, *supra* note 8, at vii n.7.

38. *Id.* at vii.

39. *See id.*

40. *Id.* at 13.

41. *Id.*

42. *Id.* (calculating breakdown as 45% Chinese, 29% Vietnamese, 7.3% Korean, and the remainder made up of Japanese, Filipino, Thai, Laotian, Cambodian, and Polynesian traffickers).

43. Richard, *supra* note 8, at 13.

44. *Id.* at 13-14.

45. *Id.* at 13.

46. *Id.* “Loose joint venture” refers to joining of criminal groups to take advantage of immediate economic opportunity. *Id.*

47. *Id.* at 13-14.

to the United States.⁴⁸ The American Embassy in Bangkok estimates that at least four loosely organized criminal groups or families traffic Thai women monthly to the United States and Canada.⁴⁹ Some women are told they will have jobs as seamstresses or hostesses but are then forced into prostitution to pay the debt of having been trafficked.⁵⁰ Others travel knowing they will be prostitutes but find themselves in slave-like situations.⁵¹

In 2001, authorities uncovered a smuggling ring headquartered in San Jose, California, with possible connections to the Chinese organized crime syndicate Dai Huen Jai (Big Circle Gang).⁵² Nineteen people were indicted as members of the prostitution and immigrant-smuggling ring.⁵³ "They are accused of smuggling women into the United States from Korea, Malaysia and elsewhere in Southeast Asia and forcing them to work in low-profile brothels in California and other parts of the country."⁵⁴ The ring allegedly managed brothels in more than twenty cities "typically operated out of single-family homes in suburban settings where they were less likely to arouse suspicion Some of the women paid . . . \$40,000 to be smuggled into the U.S., and were required to repay the debt to smugglers by working as prostitutes."⁵⁵ The women were not facing criminal charges but were detained by the I.N.S.⁵⁶ They could become the "first captives of an international sex slave ring to benefit from [the Victims of Trafficking and Violence Protection Act of 2000 (H.R. 3244)] enacted last year to help victims of the booming global sex trade."⁵⁷

Increasingly, women and girls in impoverished regions facing post-communist transition are "lured into the international sex trade with promises of a better life and a lucrative job abroad."⁵⁸ Russian individuals, some connected to the Russian mafia,⁵⁹ traffic women from Russia,

48. *Id.* at 14.

49. Richard, *supra* note 8, at 14.

50. *Id.*

51. *Id.*

52. Bill Wallace, *2 Bay Area Men Charged in Prostitution to Seek Bail: Federal Case Alleges They Led Smuggling Ring*, S. F. CHRON. (pm), Feb. 13, 2001, at A15.

53. *Id.*

54. *Id.*

55. *Id.* (quoting Assistant U.S. Attorney Matt Jacobs, a spokesman for the federal prosecutor's office in San Francisco).

56. *Id.*

57. Howard Mintz, *Asian Women Sold into Sexual Servitude Remain in Legal Limbo*, SAN JOSE MERCURY NEWS, Feb. 14, 2001, at 1B. However, attorneys from the Asian Law Caucus, a legal and civil rights organization serving low income Asian Pacific American communities, had trouble contacting the women, "getting the runaround" from the I.N.S. See *id.* (quoting Ivy Lee, formerly a staff attorney with the Asian Law Caucus in San Francisco).

58. CALDWELL, *supra* note 4.

59. Pilkerton, *supra* note 22, at 222-24 (defining mafia as a method that creates personal wealth and reputation by assigning certain functions to a sub-cultural system, "para-governments" with corrupt alliances with public agencies; also noting that the United States Department of Justice has elevated the Russian mafia to the same investigative priority as Italian, Colombian, and Chinese organized crime syndicates).

Ukraine, the Baltic States, and Central Europe to the United States.⁶⁰ “Front” organizations in the United States include dance, modeling, employment or service agencies.⁶¹ Women are also trafficked to work as maids in motels, working long hours for very little pay.⁶² Women who are sold into forced prostitution under the guise of modeling or dancing often have their passports confiscated by the “local mafiosi,” who then force these women to work off thousands of dollars for the return of their passports and other documentation.⁶³

B. ECONOMICS OF TRAFFICKING

“Traffickers are traders in human beings who either buy women from husbands, buy children from parents, fraudulently promise them well-paying jobs or lucrative marriages at the other end, or they abduct them.”⁶⁴ The variety of ways in which traffickers procure women reflects the “morality of money” underlying the new slavery in the global economy.⁶⁵ The “otherness” of slaves⁶⁶ has ceased to be the justification for violently and cruelly controlling them.⁶⁷ “Most slaveholders feel no need to explain or defend their chosen method of labor recruitment and management. Slavery is a very profitable business, and a good bottom line is justification enough.”⁶⁸ And when the otherness of color or religion is not a criterion, one’s own neighbors can be recruited. The essential criteria “focus on weakness, gullibility, and deprivation.”⁶⁹ “The question isn’t ‘Are they the right color to be slaves?’ but ‘Are they vulnerable enough to be enslaved?’”⁷⁰

The United Nations estimates that the global earnings for traffickers in human beings reach seven billion dollars annually.⁷¹ “In most of the major recent trafficking cases in the United States, the traffickers made anywhere from one to eight million in a period ranging from one to six years.”⁷² Regardless of the conditions of employment described by the recruiter, trafficked “[w]omen are forced to work as bonded labour in payment for

60. Richard, *supra* note 8, at 15.

61. *Id.* at 16 (describing various agencies used to obscure trafficking activities).

62. *Id.*

63. See Pilkerton, *supra* note 22, at 228.

64. KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 165 (1995).

65. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 10 (1999).

66. *Id.* (using the example of race as a characteristic distinguishing slave traders and owners from the Africans they traded to the United States, which they relied on to justify their participation in the slave trade) (emphasis omitted).

67. See *id.*

68. *Id.*

69. *Id.* at 11.

70. *Id.*

71. Becki Young, *Trafficking of Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73 (1998); CALDWELL, *supra* note 4.

72. Richard, *supra* note 8, at 19.

debts incurred during migration.”⁷³

The large profits that the sex industry generates is [sic] related to low overhead. . . . [T]he control of the sexual labor force through confinement in brothels and the subtraction of all maintenance costs, *as well as her purchase price and travel expenses*, from the woman's earnings often results in the sex worker's incurring debt the longer she works.⁷⁴

In one case of a New York brothel, the profits were one and a half million dollars over a year and three months.⁷⁵ The women were forced to pay debts ranging from \$30,000 to \$50,000.⁷⁶ They charged clients \$130, \$30 of which went to the madam and \$100 to the smugglers.⁷⁷ Costs are kept down by crowding women together in poor living conditions.⁷⁸ Smugglers also generate profits by charging women for the return of their passports.⁷⁹ Typically profits are shared among several links in the trafficking chain.⁸⁰ In an example of a Thai profit sharing scheme, amounts from \$13,000 to \$15,000 go to the smuggler.⁸¹ The smuggler in turn gives anywhere from \$800 to \$1400 to the Thai recruiter and \$1000 to the “jockey,” the person who brought the woman into the United States.⁸² The Special Rapporteur on Violence Against Women, Ms. Radhika Coomaraswamy, stated, “[t]rafficking in women flourishes in many less developed countries because the vulnerabilities arising from women's lack of access to resources, poverty and gender discrimination are maintained through the collusion of the market, the State, the community and the family unit.”⁸³

C. MECHANICS OF TRAFFICKING

1. Recruitment

At the core of the trafficking phenomenon is the lack of consent. But, the degree to which traffickers inform the women varies.⁸⁴ Some women are “completely duped,” others learn “half-truths” but find themselves doing work they did not agree to, and still others are informed of the work

73. SKROBANEK, *supra* note 16, at 66.

74. RITA NAKASHIMA BROCK & SUSAN BROOKS THISTLETHWAITE, *CASTING STONES: PROSTITUTION AND LIBERATION IN ASIA AND THE UNITED STATES* 122 (1996) (emphasis in original).

75. Richard, *supra* note 8, at 19.

76. *Id.*

77. *Id.* In the recent Bay Area case the clients were charged \$140 an hour. Mintz, *supra* note 57.

78. Richard, *supra* note 8, at 19.

79. Mintz, *supra* note 57 (describing cost of passport as ranging from \$900 to \$4000).

80. *See id.*

81. *Id.*

82. *Id.*

83. *Special Rapporteur, supra* note 2, at 20.

84. *Id.* at 14 (adopting Global Survival Network's identification of four groups of women trafficked into the sex trade with different levels of consent).

they will be doing but then are kept in debt bondage with no financial alternatives.⁸⁵ Traffickers modify the means by which they achieve their goals as new opportunities arise.⁸⁶ Traffickers use changes in technology, eruption of war and civil strife, and the emergence of economic vulnerabilities to their advantage.⁸⁷ “Trafficking is a dynamic concept, the parameters of which are constantly changing to respond to changing economic, social and political conditions.”⁸⁸

There is a spectrum of ways in which women trafficked for sexual slavery are obtained.⁸⁹ “The girls might be sold by their parents to a broker, or tricked by an agent; once away from their homes they are brutalized and enslaved, then sold to a brothel owner.”⁹⁰ Women are also typically lured by stories of well-paying jobs in factories or restaurants, or as nannies, models, or exotic dancers.⁹¹ Additionally, some women know they will be engaged in prostitution and later find themselves in slave-like conditions. Personal narratives illustrate recruitment strategies.

Anita Sharma Bhattarai presented to the House Subcommittee on International Operations and Human Rights her story of being kidnapped from Nepal and trafficked to India.⁹² In the course of selling vegetables to support her children, she was drugged by a Nepali couple she happened to sit next to on a bus one day.⁹³

The next thing that I remember is waking up in the train station in Gorakhpur, India. I am from a mountain village. I did not know what a train was and, of course, I had never been to India. I asked the man where I was. I was confused by the long cars that I was riding in and the strange surroundings.⁹⁴

Ms. Bhattarai was taken to a brothel where she was told she had been purchased and must work as a prostitute in order to pay back the debt incurred.⁹⁵ Her literacy was tested so that the brothel owners knew whether to keep pens out of her reach; her hair was cut so that she would be easily identified as a prostitute; she was forced to learn a new language; and she

85. *Id.* Women that are both informed and in control of their own movements are not considered trafficked persons.

86. *Id.* at 8.

87. *Id.*

88. *Id.* at 8-9.

89. *Special Rapporteur, supra* note 2, at 14.

90. BALES, *supra* note 65, at 18.

91. Richard, *supra* note 8, at 5.

92. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int'l Operations & Human Rights of the Comm. on Int'l Relations*, 106th Cong. 35-36, 98-102 (1999) [hereinafter *Int'l Operations & Human Rights Subcomm. Hearing*] (testimony of Anita Sharma Bhattarai, victim of international sexual trafficking from Nepal to India).

93. *Id.* at 98.

94. *Id.* at 98-99.

95. *Id.* at 99.

was beaten by the brothel owners until she submitted to customers of the brothel.⁹⁶ The prostitutes, both voluntary and forced, were all from Nepal.⁹⁷ "The women tried to reassure me that being a prostitute was not that bad. All of my food, housing, and clothes were provided. All I would have to do, they said, was sell my body."⁹⁸ Each of the clients paid 220 rupees, all of which went to the brothel owners.⁹⁹

Maria and Rosa, two women trafficked into the United States from Mexico, gave Congressional testimony in 2000.¹⁰⁰ Both of their stories fall at a point on the spectrum far from kidnapping.¹⁰¹ An acquaintance of Maria told her about jobs in restaurants or bars in the United States.¹⁰² Seeming like an improvement over her jobs as a domestic helper and at a general store in Veracruz, Maria agreed to be brought to the United States via Texas by a coyote.¹⁰³ The "ringleader" then moved Maria to Florida and forced her to work in a brothel to pay off a smuggling debt of \$2200.¹⁰⁴ Rosa also voluntarily crossed the border with a coyote.¹⁰⁵ At the age of fourteen she left her job cleaning rooms in a hotel after meeting a man who convinced her of better job opportunities in the United States.¹⁰⁶ Rosa also was forced into prostitution.¹⁰⁷

2. Entry into the United States

Traffickers transporting women into the United States use various methods of evading detection, including avoiding I.N.S. inspection, falsifying documents, and using legitimate documents with the intent to overstay.¹⁰⁸ The visas that traffickers use include tourist, business, fiancée,

96. *Id.*

97. *Id.*

98. *Int'l Operations & Human Rights Subcomm. Hearing, supra* note 92, at 100.

99. *Id.* at 101. Ms. Bhattarai managed to escape the house where she had been locked in with a padlocked gate for one and a half months without seeing the sunlight. *Id.* at 101-02. She now lives back in Nepal, but not in her home village where she was ostracized upon her return. *Id.* at 102. She works as a domestic servant in Katmandu. *Id.* "But my husband does not want my children to be with me because of where I have been." *Id.*

100. *International Trafficking in Women and Children: Hearing Before the Near East & South Asian Affairs Subcomm. of the U.S. Senate Foreign Relations Comm.* 106th Cong. 90-93 (2000) [hereinafter *Near East & South Asian Affairs Subcomm. Hearing*] (testimony of Maria and Rosa, victims of international trafficking from Mexico to the U.S.), available at <http://secretary.state.gov/www/picw/trafficking/maria.htm> and <http://secretary.state.gov/www/picw/trafficking/rosa.htm>.

101. *Id.* at 93.

102. *Id.* (testimony of Maria).

103. *Id.* "Coyote" refers to a person paid to smuggle others across borders, especially the U.S.-Mexico border. THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 225 (1997).

104. *Near East & South Asian Affairs Subcomm. Hearing, supra* note 100, at 93 (testimony of Maria).

105. *Id.*

106. *Id.*

107. *Id.* (testimony of Rosa).

108. Richard, *supra* note 8, at 7.

student, and entertainment visas.¹⁰⁹ The women then overstay the legal visa period.¹¹⁰ Traffickers also purchase false identification for these women.¹¹¹ For example, "Russian traffickers are able to purchase false or altered passports from authorities in the Ministry of Foreign Affairs, or through companies with connections to Interpol (the international police organization) which change the name, nationality, or age of a person traveling abroad."¹¹² Many women from Russia are brought through Toronto, where they blend in with a large Russian immigrant community.¹¹³

Sometimes traffickers pose as family members of the trafficking victims in order to present themselves as an innocent group of travelers.¹¹⁴ In a 2001 case in Berkeley, California, a man and his sister posed as the parents of two Indian girls they were smuggling into the United States to serve as sexual slaves for their brother, Lakireddy Bali Reddy.¹¹⁵ In another case, an Indonesian man allegedly affiliated with an international smuggling ring arrived in Los Angeles with a two year old Thai boy and a Chinese woman "destined to be a sex slave somewhere in the United States."¹¹⁶ "The boy was a decoy, designed to make them look like a family on holiday."¹¹⁷ The toddler had been "rented" by the trafficker for \$250 from his mother, "a drug addict sold into sexual slavery at age 12."¹¹⁸

D. SLAVE-LIKE CONDITIONS FACED BY WOMEN TRAFFICKED TO THE UNITED STATES

Once in the United States, the situation for trafficked women often fits into one or more of the three categories of "new slavery" described by a leading expert on contemporary slavery.¹¹⁹ The three categories are chattel slavery, debt bondage, and contract slavery.¹²⁰

While chattel slavery most closely resembles the "old slavery," people sold or captured into permanent servitude make up a small portion of the modern world's slaves.¹²¹ One example includes "a 13-year-old Nigerian girl brought into the United States and held in involuntary servitude in the

109. *Id.*

110. *Id.*

111. *Id.*

112. Pilkerton, *supra* note 22, at 228.

113. Melanie Nezer, *Trafficking in Women and Children: "A Contemporary Manifestation of Slavery,"* REFUGEE REPORTS (U.S. Comm. for Refugees, Washington, D.C.), Summer 2000, at 3.

114. See Matthew Yi, *Guilty Plea in Smuggling of Girls: Landlord Gets 5 years in Prison*, S.F. CHRON., March 8, 2001, at A21.

115. *Id.*

116. *Thai Tot Stirs Different Debate*, NEWSDAY, May 18, 2000, at A24.

117. *Id.*

118. *Id.*

119. BALES, *supra* note 65, at 19-22.

120. *Id.* at 19-20.

121. *Id.* at 19.

Bronx for nine years,"¹²² closely resembling an indefinite owner-slave relationship. More common than chattel slavery, however, are debt bondage and contract slavery, which overlap in many women's experiences.¹²³

"Debt bondage is the most common form of slavery in the world."¹²⁴ Debt bondage arises from the money paid to a trafficked person's parents and/or the money spent on the individual's passage and forged documents by the traffickers, as well as the purchase by the brothel or sweatshop owner. "Upon arrival in the United States, the women who were promised legitimate jobs are told these jobs are no longer available, and that they must work as prostitutes to pay off their 'passage fee.'"¹²⁵ "Girls trapped into prostitution by debt bondage will sometimes have contracts that specify their obligations."¹²⁶ There is generally no assertion of permanent ownership of the women, "but there is complete physical control of the bonded laborer."¹²⁷ Rojana Chuenchijit, a young Thai woman, told of being imprisoned in the *El Monte* sweatshop near Los Angeles.¹²⁸ The workers were under armed guard, and she shared one bedroom with eight others behind windows blocked by plywood.¹²⁹ "[H]er captors made [threats] against her and her family in Thailand to scare her into staying."¹³⁰

The temporary nature of the servitude is a benefit to the enslavers, who control the debt and interest calculations which can then be "manipulated to show whatever they like The brothel does have to feed the girl and keep her presentable, but if she becomes ill or injured or too old, she is disposed of. In Thailand today, the girl is often discarded when she tests positive for HIV."¹³¹ At a 2000 Congressional hearing, Maria described her experience as a woman trafficked from Mexico into a U.S. brothel:

Tickets were condoms. Each ticket would be sold for \$22 to \$25 each. The client would then point at the girl he wanted and the girl would take him to one of the bedrooms. At the end of the night, I turned in the condom wrappers. Each wrapper represented a supposed deduction to my smuggling fee. We tried to keep our own records, but the Bosses would destroy them. We were never sure what we owed.¹³²

The most rapidly growing form of slavery is contract slavery, where

122. Theola S. Labbe, *Arrest Highlights Exploited Workers*, *NEWSDAY*, July 15, 1999, at A69.

123. BALES, *supra* note 65, at 19.

124. *Id.* at 20.

125. Raghu, *supra* note 15, at 162.

126. BALES, *supra* note 65, at 20.

127. *Id.*

128. Nezer, *supra* note 113, at 1.

129. *Id.*

130. *Id.*

131. BALES, *supra* note 65, at 18.

132. *Near East & South Asian Affairs Subcomm. Hearing*, *supra* note 100, at 91 (testimony of Maria).

"[c]ontracts are offered that guarantee employment, perhaps in a workshop or factory, but when the workers are taken to their place of work they find themselves enslaved."¹³³ The formality of the agreement, combined with the women's ignorance of their legal rights in a foreign country, contributes to their belief that they must work off debts of thousands of dollars.¹³⁴ Such contracts also confuse the issue for police or other state actors who have an obligation to help trafficked people. In a 1998 Toronto case involving 53 women trafficked from Asia, "law enforcement agents were hesitant to label the operation sexual slavery owing to the existence of 'contracts', under which the women's travel documents were confiscated, their movements restricted and they were forced to work off their debt by performing approximately 400-500 sex acts."¹³⁵

Violence, or the threat of violence, as an enforcement mechanism is common to all three basic forms of slavery.¹³⁶ This can include "threatening them with physical violence, their own death or that of their families back in their native countries."¹³⁷ Traffickers also use the coercive tactics of "sexual abuse, torture, starvation, and imprisonment."¹³⁸ Another form of control includes women's isolation, which results from not knowing the language and being moved around "to limit their ability to form ties to the community – or, in the case of the sex industry, to clients."¹³⁹

The brothels were often in isolated areas. I never knew where I was. It was all so strange to me. We were not allowed to go outside of the brothels. I knew if I tried to escape I would not get far because everything was so unfamiliar. The Bosses told me that if I escaped, I.N.S. would catch me, beat me and tie me up. This frightened me.¹⁴⁰

The traffickers typically confiscate passports and other documents, and "their victims, many of whom know they have entered the country illegally . . . worry about trouble with government authorities."¹⁴¹

Rape and sexual violence are coercive strategies used in the course of trafficking women into various situations of forced labor and slave-like conditions.¹⁴² "Forms of sexual violence, however, are most persistently used against trafficked women to 'condition' them for forced sex work."¹⁴³

133. BALES, *supra* note 65, at 20.

134. Pilkerton, *supra* note 22, at 228.

135. *Special Rapporteur*, *supra* note 2, at 17.

136. BALES, *supra* note 65, at 19.

137. Christopher M. Pilkerton, *Changing the Chameleon: A New Approach to the Investigation of Transnational Organized Crime*, 10 INT'L LEGAL PERSP. 247, 276 (1998).

138. Nezer, *supra* note 113, at 3.

139. *Id.*

140. *Near East & South Asian Affairs Subcomm. Hearing*, *supra* note 100, at 91-92 (testimony of Maria).

141. Nezer, *supra* note 113, at 3.

142. *Special Rapporteur*, *supra* note 2, at 15.

143. *Id.*

Rosa, trafficked from Mexico to the United States, describes her experience:

And so my nightmare began. Because I was a virgin, the men decided to initiate me by raping me again and again, to teach me how to have sex. Over the next three months, I was taken to a different trailer every 15 days. Every night I had to sleep in the same bed in which I had been forced to service customers all day.¹⁴⁴

Additionally, threats of deportation, and sometimes actual bolts and chains, immobilize trafficked women, depriving them of their liberty.¹⁴⁵ "Some advocates have compared the violence perpetrated against trafficked women to torture and cruel or inhuman treatment in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."¹⁴⁶ Trafficked women face threats to their bodily integrity because of the risk of sexual abuse by their traffickers and even police or immigration officials.¹⁴⁷ Women trafficked into prostitution are severely compromised on the most basic level.

We worked 6 days a week and 12-hour days. We mostly had to serve 32-35 clients a day. Weekends were worse. Our bodies were utterly sore and swollen. The bosses did not care. We worked no matter what. This included during menstruation.

Clients would become enraged if they found out. The bosses instructed us to place a piece of clothing over the lamps to darken the room. This, however, did not protect us from client beatings. Also, at the end of the night our work did not end. It was now the Bosses turn with us. If anyone became pregnant we were forced to have abortions. The cost of the abortion would then be added to our smuggling debt.¹⁴⁸

E. DEFINITIONS OF TRAFFICKING

1. Trafficking as a Human Rights Issue

Definitional issues are tremendously important in constructing a remedy for the abhorrent situation of trafficking. Trafficking is commonly considered as an immigration issue, and trafficking victims are often blamed for their own situations.¹⁴⁹ Although there are similarities between trafficking and immigration issues, such as smuggling people across

144. *Near East & South Asian Affairs Subcomm. Hearing, supra* note 100, at 93 (testimony of Rosa).

145. *Special Rapporteur, supra* note 2, at 15.

146. *Id.*

147. *Id.* at 17.

148. *Near East & South Asian Affairs Subcomm. Hearing, supra* note 100, at 91 (testimony of Rosa).

149. Young, *supra* note 71, at 74.

borders, it is important to recognize that trafficking has other dimensions and should be characterized “as a human rights issue with immigration implications.”¹⁵⁰ The “critical step” in such a characterization is to recognize “the similarities between trafficking and other forms of exploitation and abuse.”¹⁵¹

2. Who is a Trafficked Person?

When analyzing protective legislation, one must clarify the definition of trafficking to ascertain who is protected and from what. Some controversial aspects of protection include gender and age.¹⁵² Human rights scholars, activists, and professionals have wrestled with these issues and provided some insight.¹⁵³ With regard to gender, “the preferred term is ‘trafficking in persons’ (as opposed to ‘trafficking in women,’ for example.)”¹⁵⁴ This acknowledges both the reality that men are also trafficked, generally for industrial and sweatshop sectors, and the reality that girls and boys are trafficked.¹⁵⁵ Further, “it [is] agreed that there are undeniably gendered aspects to trafficking which require a gender-specific focus on women and girl-children in any official or legislative response.”¹⁵⁶ Children should be addressed separately because of the different kinds of domestic and international rights-protection they receive.¹⁵⁷

3. What Constitutes Trafficking?

In addition to who is protected, definitions include certain mechanisms and conditions of trafficking. The issues related to what is considered trafficking are: (1) whether crossing international borders is required; (2) whether the definition should only include trafficking for purposes of

150. *Id.* at 75.

151. *See id.* at 74. Similarities to domestic abuse, for example, include the exploitation of economic vulnerability, subjection to violence, and “hesita[tion] to report the abuse for various reasons, i.e., fear of deportation.” *Id.*

152. *See generally* Miller & Stewart, *supra* note 6, at 13 (noting that women and girls are disproportionately trafficked and thus deserve special attention, but that men and boys are also trafficked and should not be excluded from discussion; also commenting that children exercise less autonomy and have different rights-protection than adults).

153. *See id.* at 11.

154. *Id.* at 13.

155. *Id.*

156. *Id.*

157. *See id.*

The adult/child distinction is further complicated by the fact that trafficking can and often does affect girl-children and boy-children differently. For example, girl-children are often placed in trafficking situations for different reasons, trafficked into different kinds of work or relationships, face different types of violations or abuse, and are afforded different remedies and social opportunities than boy-children. Girl-children are most often trafficked for their virginity (real or imagined) into marriage or the sex industry while boy-children are most often trafficked into sweatshop or other similar labor. Thus it is not entirely useful to collapse girl-children and boy-children into one category of trafficking victims.

Id. at 13-14.

prostitution, or should also apply to labor trafficking and marriage marketing; and (3) whether coercion is a necessary element.¹⁵⁸ The classic understanding of trafficking is the movement of persons across borders for the purpose of prostitution.¹⁵⁹ But this historical definition is too limited.¹⁶⁰

a. Crossing Geographic Boundaries

When one takes into account the ways in which victims of trafficking are isolated and made vulnerable, it is clear that crossing an international border should not be a requisite.¹⁶¹ "[T]he harm to the victims can be the same whether they are moved two miles across a national border or 1,000 miles within national boundaries."¹⁶² Trafficking victims are moved to unfamiliar locations where they are cut off from their families, communities, and support systems.¹⁶³ They are isolated physically or by virtue of an unknown language and culture.¹⁶⁴ They are "denied legal identity or access to justice, and are, therefore, at greater risk of abuse, violence, exploitation, domination and discrimination."¹⁶⁵

The U.N. Trafficking Protocol includes "the abuse of a position of vulnerability" as one of the means of trafficking persons.¹⁶⁶ Interpretive note sixty-three of the Protocol clarifies that such vulnerability exists when a person has "no real and acceptable alternative but to submit to the abuse involved."¹⁶⁷ Moving someone to a different region or to a foreign country creates such vulnerability. An example of a "constructive" border crossing would be moving a rural Thai woman from the Hill Tribe into Bangkok, in essence moving her into a different culture without crossing a geographic or political border.¹⁶⁸ Someone trafficked to an unfamiliar country faces similar isolation and marginalization, increasing her risk of discrimination by traffickers and state actors.¹⁶⁹

158. See Young, *supra* note 71, at 75.

159. See Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 80-81 (1998) (describing the narrow conception of trafficking and forced prostitution in the 1949 U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others).

160. See Miller & Stewart, *supra* note 6, at 14-15.

161. *Id.*

162. *Id.* See also Young, *supra* note 71, at 76-77.

163. *Special Rapporteur*, *supra* note 2, at 9.

164. *Id.*

165. Miller, *supra* note 6, at 15.

166. Press Release, Global Alliance Against Trafficking in Women (Oct. 18, 2000) available at www.inet.co.th/org/gaatw/SolidarityAction/Rsletter.htm [hereinafter GAATW] (on file with author) (critique of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime).

167. *Id.*

168. Miller & Stewart, *supra* note 6, at 15.

169. *Special Rapporteur*, *supra* note 2, at 9.

b. Including More than Prostitution

The expansion of the definition of trafficking to include other forms of labor and instances of slave-like conditions is necessary because people are trafficked to a variety of abusive living and working situations. In setting forth guidance for federal officials, the Department of Justice and Department of State identify victims of severe forms of trafficking in persons as anyone who has been subjected either:

(1) to sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform the commercial sex act is under 18 years of age, or (2) to the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁷⁰

This is a welcome change from the classic historical definition embodied in the United Nations 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.¹⁷¹ According to the United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, “by confining the definition of trafficking to trafficking for prostitution, the 1949 Convention excludes vast numbers of women from its protection.”¹⁷²

In addition to expanding its domestic definition of trafficking, in December 2000 the United States signed the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter “U.N. Trafficking Protocol”), which supplements the U.N. Convention against Transnational Organized Crime adopted by the U.N. General Assembly in November 2000.¹⁷³ This new international definition of trafficking is also more expansive than the 1949 Convention, including forced labor and slavery as well as forced prostitution.¹⁷⁴

Prostitution, other legal or illegal sex work, domestic, manual, or industrial labor (formal or informal), and marriage¹⁷⁵ are some of the destinations of trafficked people.¹⁷⁶

170. Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514, 38,515 (July 24, 2001) (to be codified at 28 C.F.R. pt. 1100).

171. Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Dec. 2, 1949, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272, 272 (*entered into force* July 25, 1951).

172. *Special Rapporteur*, *supra* note 2, at 11.

173. DEP'T OF STATE TRAFFICKING REPORT, *supra* note 7.

174. GAATW, *supra* note 166.

175. The mail order bride industry, although a separate topic, overlaps with issues of trafficking, as the prospective “bride” may end up in a servile position in her marriage or may be issued a fiancée visa as a way to traffic her into prostitution or other forced work. *See id.* at 16.

176. *See Chuang*, *supra* note 159, at 142-43; Miller & Stewart, *supra* note 6, at 15.

The inclusion of forced labor trafficking and trafficking for the purposes of exploitative domestic service acknowledges the similarities between these cases and cases of sex trafficking, and enables them to reap the synergistic benefits of being grouped together as one offense (i.e., increased awareness and recognition of the severity of the trafficking phenomenon).¹⁷⁷

Common elements among trafficking for prostitution and for sweatshop or other forced labor are recruitment by deception, coercion, or violence and exploitative, slavery-like living and working conditions.¹⁷⁸ While the conditions of this form of the "new slavery" are discussed above, it is necessary to clarify the concepts of consent and coercion to gain a better understanding of what will be included in the definition.

c. Consent or Coercion

Consent to prostitution and consent to trafficking, or movement, are two distinct issues. The anti-trafficking campaign is divided over the issue of whether women can consent to prostitution at all.¹⁷⁹ Some argue that prostitution is inherently exploitative and thus women are incapable of consenting to it; others suggest that women who self-regulate their work are capable of choosing prostitution as an occupation.¹⁸⁰ In order to gain signatories to the U.N. Trafficking Protocol, the delegates agreed to leave the definition of prostitution up to domestic law, enabling signatory countries to participate without outlawing consensual prostitution.¹⁸¹

Concentrating on the issue of consent to prostitution shifts the focus away from the discussion of the slavery-like conditions under which prostitution may occur and ignores the fact that some women knowingly enter prostitution. "Emphasis on the inherent exploitation caused by the physical act of prostitution rather than on the forced conditions of the prostitution activity creates a problematic distinction between forced prostitution and other forced labor and slavery-like practices."¹⁸² It is generally agreed that "[a] person cannot consent to enslavement, to forced labor of any kind, including sex work, or to debt bondage."¹⁸³ The Special Rapporteur on Violence Against Women noted in her 2000 report on trafficking that, "the structure of the definition of trafficking must establish trafficking as a separate violation from its component parts."¹⁸⁴ Although illegal migration and prostitution may in themselves violate domestic or international laws, it is the chain of events which constitutes the offense of

177. Young, *supra* note 71, at 77.

178. See Chuang, *supra* note 159, at 81; Miller & Stewart, *supra* note 6, at 15.

179. GAATW, *supra* note, 166.

180. *Id.*

181. *Id.*

182. Chuang, *supra* note 159, at 86.

183. Miller & Stewart, *supra* note 6, at 17. See also Richard, *supra* note 8, at vi.

184. Special Rapporteur, *supra* note 2, at 9.

trafficking, implicating those who sell, buy, and hold women in forced labor.¹⁸⁵

Consent to recruitment and transportation is another controversial aspect of the definition of trafficking. It brings out the idea that illegal immigration should be distinguished from trafficking, which involves human rights violations¹⁸⁶ and “occurs through the instrumentality of another person [with] the end purpose of forcing the person into a forced living or working situation.”¹⁸⁷ Consensual and voluntary border crossing, migration or movement, with or without a third party, even if done illegally or for profit,

does not constitute trafficking per se. . . . [T]he garden-variety ‘coyote’ who illegally and usually for exorbitant prices moves people across borders, but who is not linked to the forcible or deceptive movement of persons into specific exploitative situations [should not be considered] a trafficker.¹⁸⁸

Being a coyote employed to illegally move persons across borders does not become a component of trafficking unless the initial agreement gives way to tricking the person into an exploitative situation.

A helpful analytical step is to separate the recruitment and transportation from the end place of work. If either the recruitment is coercive or the work is in slave-like conditions the person may be considered trafficked.¹⁸⁹ “Thus the consent given must be a *full and informed consent* as to *both* the movement *and* the end-conditions.”¹⁹⁰ “Those who are tricked into working under abusive or exploitative labor conditions would be considered trafficking victims as they agreed to work in the sex industry, but not at the price of grave psychological, emotional or physical abuse or violence.”¹⁹¹

Subtle definitional differences range from straightforward line-drawing problems as to who does or does not qualify as a victim of these practices, to competing assumptions with respect to the potential empowerment of women. These differences of definition can play a definitive role in the formulation of strategies to provide remedies and protections to the victims of these practices.¹⁹²

The complexity of this issue creates challenges for governments seeking to prosecute traffickers and protect trafficked persons.

185. *Id.*

186. See Miller & Stewart, *supra* note 6, at 17.

187. Chuang, *supra* note 159, at 88.

188. Miller & Stewart, *supra* note 6, at 16.

189. *Id.*

190. *Id.*

191. *Id.* at 15.

192. Chuang, *supra* note 159, at 80.

III. VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

On October 28, 2000, President William J. Clinton signed into law H.R. 3244, the "Victims of Trafficking and Violence Protection Act of 2000" (hereinafter the Act, or H.R. 3244).¹⁹³ The legislative history indicates a recognition of trafficking as a human rights problem of international dimension¹⁹⁴ and the need to fight trafficking on the triple fronts of prevention, prosecution, and protection.¹⁹⁵ It particularly reflects the desire to protect victims from being jailed and/or deported while traffickers go unpunished.¹⁹⁶ During the course of enacting the legislation, hearings were held before the House Commission on Security and Cooperation in Europe,¹⁹⁷ the Subcommittee on International Operations and Human Rights of the Committee on International Relations,¹⁹⁸ and the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs.¹⁹⁹

Representative Christopher Smith's opening remarks at one of these hearings demonstrates the growing awareness of trafficking as a human rights dilemma, as well as his concern with doubly punishing the victims.

Trafficking in human beings is a form of modern-day slavery.

193. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No-106-386 Division A, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C.). It should be noted that the terms "Protection" and "Prevention" are used interchangeably when referring to the Act. In November 1999, Representatives Christopher Smith (R – New Jersey) and Sam Gejdenson (D – Connecticut) first introduced the Act to the House of Representatives. This began Congressional efforts to address the problem of trafficking. Senators Sam Brownback (R – Kansas) and Paul Wellstone (D – Minnesota) co-sponsored the companion bill in the Senate, the International Anti-Trafficking Act of 2000 (S. 2449), which was conferred to reconcile differences with H.R. 3244. The final conference package was signed into law as H.R. 3244, the "Victims of Trafficking and Violence Protection Act of 2000." See Press Release, White House, Statement by the President: H.R. 3244, the "Victims of Trafficking and Violence Protection Act of 2000" (Oct. 28, 2000), available at <http://usinfo.state.gov/topical/global/traffic/archive/00102802.htm>; Nezer, *supra* note 113, at 1.

194. 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback); 146 CONG. REC. H9,033 (Oct. 6, 2000) (statement of Rep. Christopher Smith regarding the Conference Report on the Victims of Trafficking and Violence Protection Act of 2000).

195. *Trafficking of Women and Children in the Int'l Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 106th Cong. 36-40 (1999) (statement of Laura J. Lederer, Director, Protection Project).

196. 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback); 146 CONG. REC. H9,033 (Oct. 6, 2000) (statement of Rep. Christopher Smith).

197. *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing Before the Comm'n on Sec. and Cooperation in Europe*, 106th Cong. (1999).

198. *Trafficking of Women and Children in the Int'l Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights, Comm. on Int'l Relations*, 106th Cong. (1999).

199. 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback).

When a woman or child is trafficked or sexually exploited by force, fraud, or coercion for commercial gain, she is denied the most basic human rights enumerated in the Universal Declaration of Human Rights and numerous international human rights agreements – namely, her rights to liberty and security of person, her right not to be held in slavery or servitude, and her right to be free from cruel or inhumane treatment. In the worst cases, she is denied her right to life. . . . Ironically, it is the women who are trafficked who end up being arrested in brothels raids, locked up, and then deported as illegal immigrants, while their perpetrators rarely suffer repercussions for their actions.²⁰⁰

The Act seeks to prevent trafficking by establishing international initiatives to promote economic alternatives through microcredit schemes and educational opportunities.²⁰¹ Other prevention methods include grants to nongovernmental organizations working in the field and public awareness campaigns.²⁰² The Act seeks to punish individual traffickers²⁰³ and to sanction governments which fail to meet minimum standards for the elimination of trafficking.²⁰⁴ This note will focus on the section of the Act dedicated to protection and assistance for victims of trafficking²⁰⁵ with an emphasis on the newly established T visa.²⁰⁶

Section 107 of the Act addresses protection and assistance for victims of trafficking by proposing initiatives to help resettle victims of trafficking in foreign countries,²⁰⁷ making some victims of trafficking in the United States eligible for public benefits²⁰⁸ and authorizing the Attorney General to make grants to victims' service organizations.²⁰⁹ In addition, the Act attempts to address the concerns expressed by Representative Smith regarding detention and deportation of trafficked people who are "rescued" by the Immigration and Naturalization Service.²¹⁰ Section 107(c)(1)(A) forbids the federal government from detaining victims of "severe forms of trafficking . . . in facilities inappropriate to their status as crime victims."²¹¹

200. *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing Before the Comm'n on Sec. and Cooperation in Europe*, 106th Cong. 1 (1999) (opening statement by Christopher H. Smith, Chairman, CSCE).

201. Victims of Trafficking and Violence Protection Act of 2000 § 106 (2000).

202. *See id.*

203. Victims of Trafficking and Violence Protection Act of 2000 §§ 111-12.

204. Victims of Trafficking and Violence Protection Act of 2000 §§ 108-10.

205. Victims of Trafficking and Violence Protection Act of 2000 § 107.

206. Victims of Trafficking and Violence Protection Act of 2000 § 107(e).

207. Victims of Trafficking and Violence Protection Act of 2000 § 107(a).

208. Victims of Trafficking and Violence Protection Act of 2000 § 107(b)(1) (allows for benefits when a victim of a severe form of trafficking in persons is under eighteen years old or certified by the government to identify and testify against a trafficker who is located and apprehended).

209. Victims of Trafficking and Violence Protection Act of 2000 § 107(b)(2).

210. Victims of Trafficking and Violence Protection Act of 2000 § 107(c)(1)(A).

211. *Id.* (detention is described by Maria, a trafficked person testifying before Congress:

Section 107(c), Trafficking Victim Regulations, discusses (1) protection for victims while they are detained by the federal government;²¹² (2) victims' access to information about their rights and translation services;²¹³ (3) permission for continued presence in the United States for potential victim witnesses "in order to effectuate prosecution" of traffickers;²¹⁴ and (4) training of government personnel to identify victims of severe forms of trafficking.²¹⁵ The Attorney General proposed an interim rule, effective August 23, 2001, regarding the interpretation of section 107(c).²¹⁶ In terms of protection from removal proceedings, the continued presence authorization under 107(c)(3) does not bar the I.N.S. from initiating removal proceedings.²¹⁷ The I.N.S. retains prosecutorial discretion.²¹⁸ The new nonimmigrant visa described in section 107(e) does confer an immigration status on eligible trafficked persons.²¹⁹

Section 107(e), Protection from Removal for Certain Crime Victims, amends the Immigration and Nationality Act²²⁰ to add a T visa in the nonimmigrant visa category. Nonimmigrant visas include such categories as student and tourist visas and are intended to be used for temporary stays in the United States for specific purposes.²²¹

The 'T' visa allows victims of severe forms of trafficking in persons to remain in the United States if they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons or are under 15 years of age, and would face extreme hardship involving unusual and severe harm upon removal.²²²

A defined class of trafficked persons is eligible for a T visa.²²³ The first requirement is that any T visa applicant must be a victim of "a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000."²²⁴ What makes a form of trafficking

"[a]fter the I.N.S. and FBI freed us from the brothels we were put in a detention center for many months. Our captors were correct. We thought we would be imprisoned for the rest of our lives." *Near East & South Asian Affairs Subcomm. Hearing, supra* note 100, at 91-92 (testimony of Maria)).

212. Victims of Trafficking and Violence Protection Act of 2000 § 107(c)(1).

213. Victims of Trafficking and Violence Protection Act of 2000 § 107(c)(2).

214. Victims of Trafficking and Violence Protection Act of 2000 § 107(c)(3).

215. Victims of Trafficking and Violence Protection Act of 2000 § 107(c)(4).

216. Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514, 38,515.

217. Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,516 (July 24, 2001) (to be codified as 28 C.F.R. pt. 1100).

218. *Id.*

219. *Id.*

220. 8 U.S.C. § 1101(a)(15) (1999); INA § 101(a)(15).

221. RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS 389 (3d ed. 2000).

222. Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514, 38,515.

223. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(1)(C).

224. *Id.*

“severe,” is the use of force, fraud, or coercion, and, in the instance of commercial sex, the age of the victim.²²⁵ The Act defines a severely trafficked person as someone induced by force, fraud or coercion²²⁶ into prostitution²²⁷ or subjected to involuntary servitude, peonage, debt bondage, or slavery.²²⁸ Anyone under the age of eighteen who is induced to perform a commercial sex act also qualifies as someone subjected to a severe form of trafficking in persons.²²⁹ People who initially agree to be smuggled into the United States will generally not be considered victims of severe trafficking in persons.²³⁰ Nevertheless, the Attorney General has recognized that a voluntarily smuggled person who is subsequently coerced into slave-like conditions is a victim of severe trafficking.²³¹

The second requirement for a victim of severe trafficking to qualify for the T visa is that she assist in the investigation and prosecution of her traffickers, unless she is under fifteen years of age.²³² The third requirement is that she would suffer extreme hardship involving unusual and severe harm upon removal.²³³ Finally, the Attorney General must consider it to be in the national interest to exercise discretion and waive any grounds for inadmissibility.²³⁴ There is a limit of 5000 T visas issued annually.²³⁵

There are varied statutory grounds for inadmissibility, especially after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), including health-related, criminal, security, and public charge grounds. A victim of trafficking is likely to be inadmissible if she is HIV-positive,²³⁶ is a prostitute,²³⁷ or has the potential to become a public charge.²³⁸ The Act amends the Immigration and Nationality Act,²³⁹ giving the Attorney General discretion to waive health-related and public charge grounds.²⁴⁰

225. Victims of Trafficking and Violence Protection Act of 2000 § 103(8) (any commercial sex act under age eighteen considered severe).

226. Victims of Trafficking and Violence Protection Act of 2000 § 103(2) (coercion is defined as threats of physical harm or restraint, schemes to cause persons to believe harm will result without compliance with the trafficker's demands or threatened abuses of the legal process).

227. Victims of Trafficking and Violence Protection Act of 2000 § 103(8)(A).

228. Victims of Trafficking and Violence Protection Act of 2000 § 103(8)(B).

229. Victims of Trafficking and Violence Protection Act of 2000 § 103(8)(A).

230. Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514, 38,515.

231. *Id.*

232. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(1)(C) (adding 8 U.S.C. § 1101(a)(15)(T)).

233. *Id.*

234. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(3).

235. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(2).

236. 8 U.S.C. § 1182(a)(1)(A)(i).

237. 8 U.S.C. § 1182(a)(2)(D).

238. 8 U.S.C. § 1182(a)(4)(A).

239. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(3) (adding 8 U.S.C. § 1182(d)(13)).

240. *Id.*

Rather than also specifying the criminal grounds for inadmissibility, including prostitution, the Act allows for discretion in waiving the application of "any other provision" of the section on inadmissibility (with exceptions for security, child abduction, and former citizens who have renounced citizenship to avoid paying taxes) if trafficking caused the inadmissible conduct.²⁴¹ So a person who would otherwise be ineligible for admission because she came to the United States to engage in prostitution may have that ground for inadmissibility waived if the prostitution was on account of being trafficked, and if the Attorney General deems it in the national interest to waive it.²⁴²

However, the Prostitution and Commercialized Vice ground for inadmissibility²⁴³ makes inadmissible a person who "is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status" ²⁴⁴ Potentially, any former prostitution not connected to the trafficking being prosecuted by the federal government could still be grounds for inadmissibility because the Attorney General has discretion to waive criminal bars to admission only if the crimes were caused by or incident to the trafficking under prosecution.²⁴⁵ One reason that organized crime syndicates favor trafficking women as opposed to drugs or guns is that women can be sold multiple times daily²⁴⁶ and to different traffickers. Debts can be sold from one owner to another in a cycle of debt bondage. Some Asian women are trafficked abroad to cities such as Bangkok before being sold into the United States.²⁴⁷ It is not clear how the statute would treat such prior prostitution if unconnected to the trafficker being prosecuted.²⁴⁸

If a victim of trafficking, coerced into sexual slavery or forced labor (or is underage), agrees to testify, would suffer extreme hardship upon removal, and is involved in a case relevant to national security so that the Attorney General will exercise discretion to waive the grounds of inadmissibility, the T visa will be a helpful tool.²⁴⁹ If a person satisfies the

241. *Id.*

242. *Id.*

243. 8 U.S.C. § 1182(a)(2)(D).

244. *Id.* (emphasis added).

245. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(3) (adding 8 U.S.C. 1182(d)(13)) ("[t]he Attorney General, in the Attorney General's discretion, may waive the application of . . . any other provision of [subsection (a) Classes of Aliens Ineligible for Visas or Admission] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I).").

246. 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback).

247. Richard, *supra* note 8, at 3.

248. Although the Attorney General issued an interim rule regarding interpretation of the Act section 107(c) the interim rule did not address the T visa nor inadmissibility, which are part of section 107(e). Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514-16.

249. Before signing the Act into law, the Clinton Administration expressed concerns about

requirements for a T visa and lives for three years in the United States as a person “of good moral character” while cooperating with the investigation and prosecution²⁵⁰ of the traffickers, the Attorney General may adjust her status to lawful permanent residence.²⁵¹ The average investigation and prosecution of a trafficker is one and one-half years, according to the Department of Justice’s Involuntary Servitude Coordinator in the Civil Rights Division of the Criminal Section.²⁵² Adjustment of status may also be related to the possibility of extreme hardship involving unusual and severe harm upon removal from the United States.

III. COMMENTARY ON THE T VISA

Although the legislative history of the Act indicates concern for the victims of trafficking and recognizes that trafficking violates women’s human rights, the T visa is a limited option. It limits the class of people who are eligible²⁵³ and places a numerical limit on the number of visas granted each year.²⁵⁴ At most, 5000 people per year will be granted T visas.²⁵⁵ In addition to providing relief for a limited number of trafficked persons, the Act focuses on crime-fighting, ignoring prevalent human rights issues. A statement made by one of the Act’s sponsors evidences the prioritization of the Act as a crime bill. “The legislation further includes the creation of a new form of visa for trafficking victims. This will substantially allow for more aggressive prosecution, as well as the protection of these witness victims.”²⁵⁶ The relief from deportation is inexorably linked to the crime-fighting mechanism of requiring cooperation and testimony.

International human rights authorities and non-governmental organizations have expressed skepticism about a crime control approach adequately protecting the human rights of victims of trafficking. The United Nations High Commissioner for Human Rights, Mary Robinson, wrote regarding the U.N. Trafficking Protocol: “[i]t is important in this context to note that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by

several of the provisions, one of which was the T visa. “The temporary residency visa (‘T-visa’) provision is likely to be too restrictive.” Memorandum from the Office of Management and Budget to Congress (May 9, 2000) *available at* <http://www.whitehouse.gov/omb/legislative/sap/106-2/hr3244-h.html> (visited Mar. 17, 2001).

250. Because at each level the “investigation and prosecution” of acts of trafficking includes identification, location, and apprehension, as well as testimony, it is not clear what the Attorney General would do in a case of identification with failure by law enforcement to locate or apprehend the trafficker.

251. Victims of Trafficking and Violence Protection Act of 2000 § 107(f).

252. Richard, *supra* note 8, at 3.

253. Victims of Trafficking and Violence Protection Act of 2000 § 107(e).

254. Victims of Trafficking and Violence Protection Act of 2000 § 107(e)(2)(B)

255. *Id.*

256. 146 CONG. REC. S10,137-39 (Oct. 10, 2000) (statement of Sen. Sam Brownback).

investigating and prosecuting agencies to act as witnesses in criminal proceedings.”²⁵⁷ The U.N. Special Rapporteur on Violence Against Women expressed concern that the international instrument dealing with trafficking, the U.N. Trafficking Protocol, “is being elaborated in the context of crime control, rather than with a focus on human rights.”²⁵⁸ The Special Rapporteur’s report on trafficking also highlighted concern about individual countries adopting this crime-fighting approach. “On the issue of trafficking, Governments overwhelmingly adopt a law and order approach, with an accompanying strong anti-immigration policy. Such an approach is often at odds with the protection of human rights.”²⁵⁹

The Act’s emphasis on protecting only those subject to “severe” forms of trafficking and facing “extreme hardship” upon removal, as well as its crime-fighting requirements, compromise the protection that should be afforded all people trafficked into the United States. Excluding some victims of trafficking from removal protection amounts to forced repatriation and is inconsistent with human rights norms.²⁶⁰ Those women who are granted temporary stays in the United States should not have their rights violated by being detained and prosecuted.²⁶¹ While the Act takes an important step in bringing trafficking within the realm of domestic law, applying for a T visa is not a trafficking victim’s only viable avenue for relief from deportation. An asylum claims is an approach consistent with concern for victims and with holding the United States accountable for the humanitarian requirements of international human rights instruments. Additionally, as qualification for a T visa depends on suffering extreme hardship upon removal, the asylum avenue of relief would likely subsume the people aided by the T visa.

V. FULFILLING THE ELEMENTS OF AN ASYLUM CLAIM

A. OVERVIEW OF ASYLUM REQUIREMENTS

Refugee law is the mechanism by which a person fleeing persecution may seek asylum in the United States.²⁶² A person trafficked into the United States could use this legal mechanism to apply for asylum.²⁶³ In order to succeed, an asylum applicant must qualify as a refugee pursuant to

257. *Informal Note by the U.N. High Commissioner for Human Rights*, U.N. GAOR, 4th Sess., at 5, U.N. Doc. A/Ac.254/16 (1999).

258. *Special Rapporteur*, *supra* note 2, at 7.

259. *Id.* at 16.

260. *Informal Note by the U.N. High Commissioner for Human Rights*, *supra* note 257, at 5.

261. *Id.* at 4.

262. KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: CASES AND MATERIALS* 3 (1997).

263. *Id.* at 68 (distinguishing asylum under 8 U.S.C. § 1101(a)(42)(A) which provides protection for those fleeing persecution who are already at a U.S. port of entry or within the United States from 8 U.S.C. § 1101(a)(42)(B), which provides protection for those fleeing persecution who are not at the border of or within the United States).

the definition in 8 U.S.C. section 1101(a)(42).²⁶⁴ A refugee is a person who is unable or unwilling to return to her country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁶⁵ The source of the persecution may be either the government or a person or group that the government is unwilling or unable to control.²⁶⁶

The United States has a general responsibility, as do all nations, to not return (*non-refoulement*) to his home country any person whose "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."²⁶⁷ However, the United States can exercise discretion in granting asylum to refugees as defined by the Refugee Act of 1980.²⁶⁸ United States domestic law has interpreted two distinct avenues of relief: asylum and restriction on removal. To qualify for asylum, a person must be within the definition of a refugee and satisfy the burden of proving a well-founded fear.²⁶⁹ The United States then has the discretion to grant asylum to the applicant. In contrast, restriction on removal (formerly withholding of deportation) is the U.S. version of *non-refoulement*; it compels the United States to either provide refuge to the person or find a safe third country to which the person can relocate.²⁷⁰ The Supreme Court has interpreted the burden of proof in restriction on removal cases to be clear probability because of the non-discretionary nature of the remedy.²⁷¹ The "well-founded fear" standard governing asylum claims is more generously decided on a case-by-case basis.²⁷²

B. ELEMENTS OF ASYLUM CLAIMS

In order to show that s/he is a refugee, a person must show necessary harm, the likelihood of harm, and the nexus between the harm and one of the five grounds for statutory relief: race, religion, nationality, political

264. 8 U.S.C. § 1101(a)(42).

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

Id.

265. *Id.*

266. *Id.*

267. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 606 U.N.T.S. 267, 267 [hereinafter Protocol]. The Refugee Act of 1980 [hereinafter 1980 Act] codified this concept in section 241(b)(3) of the Immigration & Nationality Act.

268. 8 U.S.C. § 1158(a) (bringing domestic law into accord with Protocol art. 1).

269. MUSALO, *supra* note 262, at 5.

270. *Id.*

271. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987).

272. *Id.*

opinion, or membership in a particular social group.²⁷³ Notice that gender is not one of the enumerated grounds for relief.²⁷⁴ The type of harm may be gender-based, as in the case of a political activist raped while in detention, as contrasted with her colleague, a male political activist being beaten.²⁷⁵ There may also be gender-based grounds for persecution, as in the case of female genital mutilation (hereinafter "FGM"), which by definition only happens to girls and women.²⁷⁶

Gender-based grounds for persecution have been brought under the social group category.²⁷⁷ Gender asylum, including both gender-based forms and grounds of persecution, is an evolving area of refugee law.²⁷⁸ The social group category is not the only group under which gender cases can be brought, for example, a political dissident punished with rape could seek asylum on the basis of political opinion.²⁷⁹ However, the social group category was developed as a more flexible category to deal with the types of cases that inevitably would be left out of the four other grounds for asylum (race, religion, nationality, and political opinion).²⁸⁰ Often, social group claims overlap with one or more of the remaining grounds.²⁸¹

1. Type of Harm

What is considered persecution (for asylum claims) or threat to life or freedom (for withholding claims) has been interpreted by domestic immigration law cases. The traditional definition of persecution is "the infliction of suffering or harm [under government sanction] upon persons who differ (in race, religion or political opinion) in a way regarded as offensive."²⁸² A common understanding of persecution is that it is a "'serious threat to life or freedom' on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁸³ Both the gravity of the harm and the perpetrator of the harm need to be carefully determined. There is a line between discrimination and persecution.²⁸⁴

273. MUSALO, *supra* note 262, at 145-46.

274. *Id.* at 599.

275. *Id.* (describing that gender may "surface" in a woman's experience of persecution as a particular form of persecution).

276. *Id.* at 600 (distinguishing gender-related forms of persecution and gender-related grounds for persecution).

277. *Id.* at 690; *Matter of Kasinga*, 21 I. & N. Dec. 3278 (B.I.A. 1996).

278. MUSALO, *supra* note 262, at 691.

279. *In re D-V-*, Int. Dec. 3252 (B.I.A. 1993).

280. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 19 (2d ed. 1996).

281. *U.N. High Comm'r For Refugees, Handbook on Procedures and Criteria for Determining Refugee Status*, at para. 77, U.N. Doc. HCR/IP/4/Eng/Rev.1 (1979) [hereinafter *UNHCR Handbook*].

282. *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988); *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir. 1969).

283. U.S. DEP'T OF JUSTICE, *I.N.S. BASIC LAW MANUAL* 23 (1994) [hereinafter *I.N.S. MANUAL*], cited in *Raghu*, *supra* note 15, at 172.

284. See *Korablina v. I.N.S.* 158 F.3d 1038 (9th Cir. 1998); *Guinac v. I.N.S.* 179 F.3d 1156 (9th Cir. 1999).

Generalized economic disadvantage does not rise to the level of persecution.²⁸⁵ By contrast, physical harm and death threats do rise to the level of persecution.²⁸⁶ International instruments do not limit persecution to physical harm, however.²⁸⁷ The perpetrator of the harm must be a government or a person/group a government is unwilling or unable to control.²⁸⁸

2. Likelihood of Harm

The applicant has the burden of proving the past occurrence or future probability of the feared harm.²⁸⁹ In order to be eligible for a grant of asylum, the applicant must prove a well-founded fear of persecution.²⁹⁰ The comparative burden for withholding of deportation is a clear probability, a stricter standard analogous to more likely than not.²⁹¹ This higher burden of proof is a U.S. standard at odds with policies of other countries, where the Article 33 requirement of *non-refoulement* applies to persons beyond a subset of those eligible for asylum.²⁹² The Supreme Court held that the lesser standard of well-founded fear applies to asylum seekers.²⁹³ There are subjective and objective elements of the well-founded fear.²⁹⁴ “Well-founded fear” has been interpreted to mean that if there is a one in ten chance of the persecution happening, that is enough.²⁹⁵

Although the Ninth Circuit held that past persecution alone is sufficient to satisfy the persecution requirement,²⁹⁶ it is the policy of the Attorney General to exercise discretion and grant asylum if there is a well-founded fear of future persecution.²⁹⁷ Past persecution gives rise to a rebuttable presumption of well-founded fear of future persecution.²⁹⁸

The I.N.S. may rebut this presumption by showing by a preponderance of the evidence that there has been “a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” in her home country, or by showing that the applicant “could avoid future persecution by relocation to another part of the applicant’s country of nationality . . . and under all circumstances, it would be reasonable

285. See *Guinac*, 179 F.3d at 1161.

286. See *id.*

287. *UNHCR Handbook*, *supra* note 281, at paras. 54-55.

288. I.N.S. MANUAL, *supra* note 283, at 29.

289. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

290. See *id.* at 423.

291. See *I.N.S. v. Stevic*, 467 U.S. 407 (1984).

292. *MUSALO*, *supra* note 262, at 2, 61.

293. See *Cardoza-Fonseca*, 480 U.S. at 421.

294. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987). See also *Cardoza-Fonseca*, 480 U.S. at 421.

295. *Cardoza-Fonseca*, 480 U.S. at 440.

296. *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988).

297. *Cardoza-Fonseca*, 480 U.S. at 423.

298. *Matter of Chen*, I. & N. Dec. 16, 21, Int. Dec. 3104 at 4 (B.I.A. 1989).

to expect the applicant to do so.”²⁹⁹

Additional evidence about the likelihood of future harm may also be necessary if the persecutor is not a state actor.³⁰⁰

However, if the presumption of future harm is rebutted, the likelihood of future harm can also be proven separately from the record.³⁰¹ In some cases, past persecution may be so severe and atrocious that “the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution.”³⁰² In *Matter of Chen*, the Board of Immigration Appeals³⁰³ determined that the applicant did not have a well-founded fear of future persecution in light of changed country conditions. The past persecution he suffered was during the Cultural Revolution.³⁰⁴ However, because “he and his family were severely persecuted . . . even more than the usual amount of ill-treatment during that turbulent period,” past persecution alone was the basis for granting asylum.³⁰⁵

3. Nexus

The nexus requirement in the definition of a refugee mandates that the persecution be on account of one of the five enumerated grounds. Establishing this link between the harm and the five grounds generally proves to be the main obstacle for applicants. Again, the U.S. has diverged from the United Nations’ interpretation of the nexus requirement and that of many of its signatories.³⁰⁶ In the U.S., while the harm is determined on both an objective and subjective basis, the nexus is a factual analysis of what was in the mind of the persecutor.³⁰⁷ In other words, the applicant has to prove the intent of the persecutor.³⁰⁸ The seminal case with regard to the nexus requirement is *I.N.S. v. Zacarias*.³⁰⁹ The Supreme Court declared that in the context of political opinion, the motive of the persecutor must be to punish the victim because of his or her opinion.³¹⁰ Thus “on account of” requires the applicant to show that the perpetrator must be motivated by a belief about the victim; the applicant must, in effect, read the mind of the

299. *Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169 (9th Cir. 2001) (citing *Asylum Procedures*, 65 Fed. Reg. 76,121, 76,133 (Dec. 6, 2000) (to be codified at 8 C.F.R. §§ 208.13(b)(1)(i)(A), 208.13(b)(1)(i)(B), 208.13(b)(I)(ii)). The I.N.S. has requested rehearing of *Aguirre-Cervantes* en banc.

300. Alyson Springer, *Proposed Rule Addresses Asylum for Victims of Gender-Based Persecution*, REFUGEE REPORTS (U.S. Comm. For Refugees), Jan. 2001, at 6.

301. See *Matter of Chen*, Int. Dec. 3104 at 18.

302. *Id.* at 19.

303. Cases are initially decided by an Immigration Judge and the appellate division is the Board of Immigration Appeals (hereinafter the Board or B.I.A.)

304. See *id.*

305. *Id.* at 21 (the persecution began when applicant was eight years old).

306. The United States takes an intent approach whereas the U.N. takes an effects approach.

307. *I.N.S. v. Zacarias*, 502 U.S. 478, 483 (1992).

308. *Campos-Guardado v. I.N.S.*, 809 F.2d 285, (5th Cir. 1987).

309. *Zacarias*, 502 U.S. at 483.

310. *Id.*

persecutor.³¹¹ Generally speaking, choosing this intent approach over an effects approach narrows the class of people who can qualify for asylum.³¹²

C. GENDER AND PARTICULAR SOCIAL GROUP

Gender as at least one element of a social group construction can be a useful way of approaching an asylum claim. Women can be viewed as a social group generally, or gender can be combined with other factors to define a more specific group. *Matter of Acosta* is the case in which the Board of Immigration Appeals defined social group.³¹³ The Board determined that “social group” should be understood and defined in the same way as the other grounds.³¹⁴ Thus members of a social group must

share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . [The characteristic] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.³¹⁵

The *Acosta* decision highlights the immutable or fundamental nature of the shared characteristic that establishes a social group, determined on a case-by-case basis.

The Ninth Circuit has also interpreted social group, using a four-part test that requires an applicant to demonstrate 1) the existence of a cognizable social group; 2) membership in that group; 3) persecution on account of group characteristics; and 4) the existence of special circumstances that merit a grant of asylum on the basis of mere membership in the group.³¹⁶ One further identifier of a social group comes out of the Ninth Circuit’s analysis: “[o]f central concern is the existence of a voluntary association among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discreet social group.”³¹⁷ In *Hernandez-Montiel v. I.N.S.*,³¹⁸ the Ninth Circuit “recognize[d] the holding of *Sanchez-Trujillo* and harmonize[d] it with *Acosta*’s immutability requirement.”³¹⁹ Thus a voluntary association or an innate or fundamental characteristic may unite a particular social

311. *See id.*

312. *See* Springer, *supra* note 300, at 2. An I.N.S. proposed rule would eliminate the punitive intent requirement for the harm to be persecution, but not the intent requirement for nexus. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588-98 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

313. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

314. *See id.*

315. *Id.*

316. *See* *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1574 (9th Cir. 1986).

317. *Id.* at 1576.

318. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000).

319. *Id.* at 1093 n.6.

group.³²⁰

Gender-related claims deserve special treatment because violations of women's rights are not generally seen as violations of human rights.

Related political and psychological assumptions posit women as situated in the private sphere and inward-oriented. Because law inadequately deals with the public/private distinction, women's cultural association with home is a major explanatory factor in the failure of the legal regime to protect female migrants from extreme forms of exploitation.³²¹

Recognizing that violations of women's rights are violations of human rights strengthens the argument that the violations are persecution within the meaning of the Protocol and the Refugee Act of 1980. Showing that the violations are perpetrated or condoned by the state is necessary to demonstrate that the persecutor is the government or a group the government is "unable or unwilling to control."³²² Even if there are laws specifically addressing the practice taking place, if they are unenforced, the victim has no recourse.

An international framework can help inform the global community as to what is persecution in the context of a gender and social group claim. The I.N.S. Basic Law Manual, which is persuasive authority for the I.N.S.,³²³ notes that "serious violations of basic human rights can constitute acts of persecution."³²⁴ Also, the I.N.S.'s own guidelines on the treatment of women refugees may be referenced.³²⁵ The guidelines, however, are not binding and are limited in that they are directed only at the asylum officer corps. Further, a pending I.N.S. Proposed Rule will be binding authority with regard to all asylum claims and will address gender specifically.³²⁶

The first cases brought on gender-related social group grounds involved Iran's repressive social norms.³²⁷ Although these asylum applicants were ultimately denied, they helped form gender jurisprudence.³²⁸ The cases intensified the requirements for women under the social group category. The Third Circuit added a new requirement for showing persecution, rejecting an applicant because she would not refuse to

320. *See id.* at 1093.

321. Fitzpatrick & Kelly, *supra* note 22, at 57.

322. *Aguirre-Cervantes*, 242 F.3d at 1178.

323. Raghu, *supra* note 15, at 172 (I.N.S. Basic Law Manual not binding authority for the I.N.S.).

324. I.N.S. MANUAL, *supra* note 283, at 24, *quoted in* Raghu, *supra* note 15, at 172.

325. Phyllis Coven, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995), *cited in* MUSALO, *supra* note 262, at 699, 706 (describing gender alone or in combination with other characteristics that define the particular social group).

326. *See* Springer, *supra* note 300 (analyzing proposed rule).

327. *See* *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993); *Safaie v. I.N.S.* 25 F.3d 636 (8th Cir. 1994); *Fisher v. I.N.S.* 79 F.3d 955 (9th Cir. 1996).

328. MUSALO, *supra* note 262, at 648.

comply with the social norms if returned to Iran.³²⁹ In *Safaie v. I.N.S.*, the Eighth Circuit built on the same approach, finding that the applicant lacked the “missionary fever” to be persecuted.³³⁰ In other words, compliance was not as abhorrent to her as persecution.³³¹ After these initial gender-related social group cases, the B.I.A. reincorporated gender-related claims into “traditional” asylum jurisprudence in *Matter of Kasinga*.³³² Its message was “that gender-related claims do *not* require a new framework, but can and must be addressed within the four corners of traditional asylum jurisprudence, rooted in the international refugee definition itself.”³³³

Some hopeful cases have encouraged the use of the social group as a strategy to help women. In *Matter of Kasinga*, the Board granted asylum to a young woman from Togo based on her membership in the social group of “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe, and who oppose the practice.”³³⁴ One of the lessons from *Kasinga* is that a narrowly constructed social group can be recognized. “*Matter of Kasinga* clearly recognizes sexual violence as a form of persecution and grounds for asylum under U.S. law.”³³⁵ The Board rejected the attempt by the I.N.S. to inject the fear of the floodgates into its decision-making process.³³⁶

After *Matter of Kasinga*, the Board attempted to retreat from its social group precedent. In *Matter of R-A-*, the Board denied the social group/political opinion claim of a Guatemalan woman whose husband repeatedly abused her.³³⁷ “On January 19, [2001,] the attorney general vacated *Matter of R-A-* and remanded the case to the B.I.A. to reconsider once the proposed rule is finalized.”³³⁸ In *Aguirre-Cervantes v. I.N.S.*, the Ninth Circuit, in 2001, granted withholding of deportation and remanded the case to the Attorney General to exercise discretion regarding the asylum claim of a young woman from Mexico whose father had brutally beaten her since the age of three.³³⁹ The applicant framed her argument as a social

329. *Fatin*, 12 F.3d at 1240.

330. *Safaie*, 25 F.3d at 200.

331. *Id.*

332. *Matter of Kasinga*, 21 I. & N. Dec. 3278.

333. MUSALO, *supra* note 262, at 690 (emphasis in original).

334. *Matter of Kasinga*, 21 I. & N. Dec. 3278.

335. Binaifer A. Davar, *Rethinking Gender-related Persecution, Sexual Violence, and Women's Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law*, 6 TEX. J. WOMEN & L. 241, 243 (1997).

336. *See id.* (addressing the I.N.S. fear of floodgates mentality, one victim of trafficking testified: “If anyone thinks that providing protection to trafficking survivors by affording them permanent residency status is a magnet for other immigrants like myself; they are wrong. No woman or child would want to be a sex slave and endure the evil that I have gone through.” *Near East & South Asian Affairs Subcomm. Hearing*, *supra* note 100, at 91 (testimony of Maria)).

337. *Matter of R-A-*, 22 I. & N. Dec. 3403 (B.I.A. 1999).

338. Springer, *supra* note 300, at 1.

339. *See Aguirre-Cervantes*, 242 F.3d at 1178.

group claim.³⁴⁰ The I.N.S. has requested re-hearing en banc.³⁴¹

D. A TRAFFICKED PERSON'S POTENTIAL ASYLUM APPLICATION

1. Type of Harm

For many trafficked women, the element of past persecution can be established by their experiences. The gravity of the harm in many cases would certainly rise to the level of persecution, as "seasoning" a newly trafficked woman or girl often involves rape and beating.³⁴² In terms of the traditional definition of persecution, "[t]he infliction of suffering or harm . . . upon persons who differ in a way regarded as offensive,"³⁴³ commentators suggest that one reason women are subjected to sexual slavery is to control "their lives and their sexuality."³⁴⁴ Trafficking and life in brothels constitute a threat to freedom, as women may be imprisoned in brothels "with bars on the windows and remote-operated front gates."³⁴⁵ Such confinement is also a factor in domestic servitude and sweatshop labor. Sexual slavery in particular is also a threat to life, as women are raped and beaten, and "the women are highly susceptible to AIDS and other sexually transmitted diseases."³⁴⁶ Women must spend their own tips on condoms, if they are even allowed to use prophylactics, and have no control over who their clients are or what they do.³⁴⁷

In terms of fitting trafficking into the definition of persecution, trafficking should be viewed as a "serious violation . . . of basic human rights."³⁴⁸ Several international conventions directly address trafficking in women,³⁴⁹ including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others³⁵⁰ and the Convention of the Elimination of All Forms of Discrimination Against Women.³⁵¹ In November 2000, the U.N. General Assembly adopted the

340. *See id.* at 1169.

341. The proposed rule regarding social group and gender violence is not likely to be finalized by the Bush administration as its focus is currently on the "Anti-Terrorism Bill" of 2001.

342. *Special Rapporteur*, *supra* note 2, at 15.

343. *Desir v. Ichert*, 840 F.2d 723, 727 (9th Cir. 1988).

344. Raghu, *supra* note 15, at 173.

345. *Id.*

346. *Id.* at 173-74.

347. Richard, *supra* note 8, at 1 (noting that some trafficked women are required to have unprotected sex).

348. I.N.S. MANUAL, *supra* note 283, at 24, *quoted in* Raghu, *supra* note 15, at 174.

349. Toepfer & Wells, *supra* note 9, at 93.

350. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *supra* note 171. "The Parties to the present convention agree to punish any person who, to gratify the passions of another: 1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person . . ." *Id.* at 274.

351. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14. "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and

U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the U.N. Convention against Transnational Organized Crime.³⁵² Under the Slavery Convention of 1926, victims of trafficking would also fit the definition of slavery³⁵³ as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”³⁵⁴ The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery³⁵⁵ “requires states parties to impose domestic criminal sanctions on individuals who engage in, among other things, selling women, turning children over for exploitation, and debt bondage schemes.”³⁵⁶ The Fourth World Conference on Women, Beijing, Platform for Action³⁵⁷ called on states to address root factors of trafficking through civil and criminal remedies.

In addition to treaties about prostitution and slavery, treaties addressing more general human rights issues, such as labor, should insist that immigration officials recognize trafficking as persecution in violation of human rights. There are two relevant International Labor Organization (hereinafter “ILO”) conventions:³⁵⁸ the Forced Labor Convention (No. 29),³⁵⁹ adopted in 1930, and the 1957 Abolition of Forced Labor Convention (No. 105).³⁶⁰ The International Covenant on Civil and Political Rights implicates the right to be free from slavery.³⁶¹ The International Covenant on Economic, Social, and Cultural Rights³⁶² “contain[s] many

exploitation of prostitution of women.” *Id.* at 17.

352. DEP’T OF STATE TRAFFICKING REPORT, *supra* note 7.

353. See Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 221 (1997).

354. Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253, art. I § 1.

355. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 266 U.N.T.S. 40.

356. Farrior, *supra* note 353, at 222.

357. *Special Rapporteur*, *supra* note 2, at 13-14.

358. See Farrior, *supra* note 353, at 223.

359. Forced Labor Convention, ILO convention 29, June 28, 1930, 29 U.N.T.S. 55. Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” *Id.*, at 58, art. 2(1).

360. 1957 Abolition of Forced Labor Convention (No. 105), *opened for signature* June 25, 1957, 320 U.N.T.S. 291.

361. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 8(1), *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976.

362. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976.

The rights in the ICESCR that are particularly relevant to efforts to stop trafficking include the right to: education (art. 13); work (art. 6(1)); just and favorable conditions of work (art. 7); vocational guidance and training (art. 6(2)); equal remuneration for work of equal value (art. 7(a)(i)); social

rights that are central to women's livelihood. When women and girls are deprived of certain rights in the Covenant, they become vulnerable to trafficking."³⁶³ Trafficking itself violates certain of the rights outlined in the Covenant, and the Convention on the Rights of the Child³⁶⁴ "offer[s] significant potential to help curb trafficking in children for prostitution."³⁶⁵ International treaties have mechanisms of enforcement in and of themselves.³⁶⁶ As they relate to gaining refugee status under U.S. asylum law, international treaties are relevant to proving that the exploitation being endured by trafficked people rises to the level of persecution.³⁶⁷

Not only does the type of harm need to rise to the level of persecution for an applicant to qualify for asylum, but the persecutor must be the state or an entity the state is unwilling or unable to control.³⁶⁸ One way to determine whether governments are allowing trafficking to continue, or even benefiting from the profitable industry, is to check the new report required by the Victims of Trafficking and Violence Protection Act of 2000.³⁶⁹ "Sex traffic continues largely unabated from Thailand due to widespread corruption and non-enforcement of anti-prostitution and trafficking laws by the Thai government."³⁷⁰ "[Trafficking] is facilitated by the corruption of the Russian government that enables unlawful activity to occur under the guise of legitimate operations."³⁷¹ Where there are tremendous potential profits and corrupt governments and other state actors benefit from these profits, the state can be shown to be unwilling to control the organized criminal syndicates that traffic women.

security (art. 9); "the highest attainable standard of physical and mental health" (art. 12); an adequate standard of living, including adequate food, clothing and housing (art. 11); protection of children "from economic and social exploitation" (art. 10(3)); protection of children from "employment in work harmful to their health or morals or dangerous to life or likely to hamper their normal development" (art. 10(3)).

Farrior, *supra* note 353, at 231 n.96.

363. *Id.* at 231.

364. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. No. A/44/49 (1990).

365. Farrior, *supra* note 353, at 233.

366. In addition, there are U.N. working groups, Special Rapporteurs, and commissions whose mandates include addressing the problems of trafficking. *See id.* at 245-48.

367. The U.S. has recently adopted several of these international instruments, signing the U.N. Trafficking Protocol in December 2000, ratifying the ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in December 1999, and signing the Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography in July 2000. DEP'T OF STATE TRAFFICKING REPORT, *supra* note 7.

368. I.N.S. MANUAL, *supra* note 283, at 29, *quoted in* Raghu, *supra* note 15, at 172.

369. DEP'T OF STATE TRAFFICKING REPORT, *supra* note 7 (separating countries into three tiers according to their compliance with "minimum standards for the elimination of trafficking").

370. Raghu, *supra* note 15, at 178.

371. Pilkerton, *supra* note 22, at 221.

2. Likelihood of Harm

Proving the gravity of the harm in the past persecution prong of an asylum claim “may prove difficult for some trafficked women. The clandestine nature of trafficking and the fact that procurement occurred in [another country] ensure that there is little or no documentation or other evidence of trafficking when the women reach the United States.”³⁷² Even if the past persecution is proven, the I.N.S. may attempt to rebut the presumption of future harm by citing a “fundamental change in circumstances.”³⁷³ This could be relevant if the victim was a child when abducted but is now of age, or if the victim was sold for her virginity.

However, a well-founded fear of future persecution may be proven independently of past persecution if a reasonable person in the applicant’s circumstances would fear persecution.³⁷⁴ If returned to her home country, a trafficked woman faces the prospect of being caught in the same trafficking ring.³⁷⁵ In the case of Thailand, “[i]n the event women are returned, those from rural villages have no way of finding their way back home. If they do manage to return home, they are often ostracized and stigmatized for their lost virginity and for serving as a prostitute, despite the fact it was against their will.”³⁷⁶

In addition to the objective test, subjective fear is relevant to a determination of well-founded fear.³⁷⁷ “In order to bolster the credibility of her subjective fear, a trafficked woman may produce evidence of international sex trafficking to substantiate the details of her persecution.”³⁷⁸ The U.N. High Commissioner for Human Rights noted that, “trafficked persons are usually in an extremely vulnerable situation and may be subject to reprisals from traffickers.”³⁷⁹ The Special Rapporteur on Violence Against Women also recognized the likelihood that trafficked persons face danger upon repatriation: “[s]ome trafficked women want to return to their countries of origin to escape abuse and violence. Others, however, fear stigmatization, rejection by their families, prosecution by the Government or reprisals by their traffickers if they return.”³⁸⁰

3. Nexus

The nexus requirement, that the persecution be on account of one of the five grounds in the refugee definition, is the next hurdle in establishing eligibility for asylum. The social group category can be a useful tool, and

372. Raghu, *supra* note 15, at 175.

373. *Aguirre-Cervantes*, 242 F.3d at 1180.

374. *Matter of Mogharrabi*, 19 I. & N. Dec. at 445.

375. See Raghu, *supra* note 15, at 163.

376. *Id.*

377. *Matter of Acosta*, 19 I. & N. Dec. at 212.

378. Raghu, *supra* note 15, at 177.

379. *Informal Note by the U.N. High Commissioner for Human Rights*, *supra* note 257, at 4.

380. *Special Rapporteur*, *supra* note 2, at 23.

gender can be part of defining the group.³⁸¹ An example of a particular social group is “[a] young woman from a hill tribe in northern Thailand who was sold by her parents into prostitution to relieve poverty and was then brought to the United States and confined to a brothel.”³⁸² Although the *Acosta* decision enumerated shared past experience as a possible element, the Proposed Rule (I.N.S. No. 2092-00) regarding gender-related harm that was issued on December 7, 2000 “limits how past experience may be used by an applicant to determine membership in a particular social group.”³⁸³ In particular, the rule would require that the persecution itself not define the social group.³⁸⁴ Thus an applicant may be required to look to her pre-trafficked status in order to define her social group.

An immutable characteristic may be the woman's gender and/or ethnicity.³⁸⁵ A fundamental characteristic may be the social status of the person, such as an impoverished rural resident of a particular country.³⁸⁶ Nationality may also be viewed as immutable. It has been noted that the voluntary association component of the Ninth Circuit definition of social group, which may become one of the factors to consider under the Proposed Rule (I.N.S. No. 2092-00),³⁸⁷ is problematic “because, generally, [trafficked people] do not voluntarily choose to be exploited.”³⁸⁸ When attempting to define the group without relying on the persecution itself, a voluntary association is more likely to prevail. For example, perhaps the group defined by voluntary association could be young women who seek to improve their livelihood by attempting to get jobs overseas. Or, in the case of a person abducted from a rural village, the association might be people attempting to maintain their agrarian lifestyle.

4. Asylum Jurisprudence and Trafficking

Asylum law is an evolving jurisprudence that should become part of the strategy for helping victims of trafficking. Each person trafficked to the United States has her own story that might very well lend itself to a claim of asylum. An understanding of the principles of law involved, a careful study of her history and her home country situation, and a creative presentation of her special characteristics could change or save her life.

Amnesty International (hereinafter “AI”) has expressed concern about U.S. officials’ “resistance . . . to asylum claims from women who suffer

381. See *Matter of Kasinga*, 21 I. & N. Dec. 3278. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588-98.

382. Raghu, *supra* note 15, at 182.

383. See Springer, *supra* note 300, at 5.

384. See *id.*

385. See Raghu, *supra* note 15, at 182.

386. *Id.*

387. See Springer, *supra* note 300, at 5.

388. Jill C. Stroguiludis, *The Refugee Act of 1980: An Empty Promise to Exploited Children*, 29 J. MARSHALL L. REV. 995, 1021 (1996).

gender-based persecution.”³⁸⁹ The AI urgent action highlighted two asylum cases of women escaping forced prostitution. In the case of Ms. M, the Immigration Judge granted asylum to a woman from China who fled to escape being forced into prostitution as a punishment for rejecting the sexual advances of her employer.³⁹⁰ AI’s concern was directed at the fact that the I.N.S. spent several years appealing the decision.³⁹¹ The B.I.A. affirmed this decision on March 30, 2001.³⁹²

Ms. O was abducted from a former Soviet Republic and forced into prostitution in Moscow, and was destined to be trafficked to Israel or Turkey before she escaped.³⁹³ The Immigration Judge denied asylum because he did not find the persecution to be “on account of” one of the five grounds for asylum.³⁹⁴ The case is now pending on appeal to the B.I.A.³⁹⁵ “Ms. M and Ms. O face persecution in their home countries, both as women abducted to be prostitutes and as persons who do not willingly accept this forced servitude. They both meet the definition of a refugee, in AI’s opinion. AI questions why I.N.S. officials would consider contesting such claims”³⁹⁶ Although Ms. M and Ms. O were not trafficked to the U.S., their cases about forced prostitution and trafficking within borders exemplify the challenges that women trafficked to the U.S. face in their asylum applications.

The Considerations for Asylum Officers Adjudicating Asylum Claims from Women (hereinafter “Gender Guidelines”) guide asylum officers to consider forms of persecution particular to women, such as rape, as a basis for asylum.³⁹⁷ “The Gender Guidelines also state that an asylum applicant who can demonstrate a well-founded fear of persecution on account of her beliefs about the role and status of women in society may be eligible for refugee status on account of political opinion.”³⁹⁸ In the cases of Ms. M and Ms. O, the belief is the right to be free from forced prostitution. The Gender Guidelines consider gender a shared characteristic on which a social group can be based.

The I.N.S.’s apparent indifference to the Gender Guidelines is not inevitable. As noted above, a binding rule has been proposed.³⁹⁹ Canada may be used as an example of a country that is following its own gender guidelines more carefully.⁴⁰⁰ The Canadian Immigration and Refugee

389. Amnesty International, Refugee Action, July 9, 2001 further information on NSA #6/00 issued May 18, 2000 (on file with author).

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. Amnesty International, Refugee Action, *supra* note 389.

396. *Id.*

397. *Id.*

398. *Id.*

399. Springer, *supra* note 300, at 1.

400. MUSALO, *supra* note 262, at 691.

Board granted asylum to a Thai sex trade worker in debt bondage based on her particular social group of women, specifically, a social group of former sex trade workers.⁴⁰¹ The Guidelines concerning Women Refugees Claimants Fearing Gender-Related Persecution were referenced.⁴⁰² In addition to national guidelines, the U.N. Special Rapporteur on Violence Against Women encourages countries to follow the Human Rights Standards for the Treatment of Trafficked Persons, a collaborative effort by several non-governmental organizations drawing on international legal norms.⁴⁰³ Refugee law in the U.S. should be able to accommodate victims of trafficking in persons.

VI. CONCLUSION

This note describes the United States' connection to the international phenomenon of trafficking in persons. Major profits for traffickers contrast with devastating experiences of victims. The United States government has joined non-governmental organizations and international human rights scholars in acknowledging the suffering of people that exists as a result of international trafficking. The attempt to protect people under U.S. immigration law is constrained by a general protectionist immigration policy. Fortifying national borders creates the climate that fosters trafficking. Globalization restricts women's legal access to migration while simultaneously fomenting women's economic vulnerability. Trafficked women are swept up in the prosecutorial fervor of fighting transnational crime and are treated as criminals. The law and order approach to trafficking marginalizes women's human rights. Anti-trafficking legislation should prioritize women's right to unfettered movement, bodily integrity, and freedom from servitude. Being mindful that traffickers opportunistically feed off of the lack of women's rights, attempts to combat trafficking need to be women-centered. The United States should recognize gender-related persecution as a basis for refugee status. The limitations of the T visa may be counteracted by an alternative strategy of helping people via asylum law.

401. Immigration and Refugee Board of Canada, *Refugee Division Digests*: CRDD No. 298, No. T98-06186, REFLEX, Mar. 15, 2000, available at http://www.cisr.gc.ca/legal/reflex/articles/refugee/134/134-024_e.htm.

402. *Id.* Dissenters found that victims of organized crime specializing in the trafficking of women for the purpose of sexual exploitation were not a cognizable social group because prostitution is neither innate nor unchangeable. The IRB found no state protection in Thailand, but the dissenters disagreed.

403. *Special Rapporteur*, *supra* note 2, at 33; Human Rights Standards for the Treatment of Trafficked Persons (1999), available at www.inet.co.th/org/gaatw/SolidarityAction/HRSleter.htm.